

No. 87-1846

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

LAMBERT GRAVEL COMPANY, INC.

Petitioner,

versus

J.A. JONES CONSTRUCTION COMPANY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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SUMMARY OF REPLY ARGUMENT

In their brief opposing the application for writ of certiorari by petitioner Lambert Gravel Company, Inc. ("Lambert"), respondents¹ wrongfully impugn the legitimacy of the question Lambert presents, thereby for the first time placing at issue this Court's scope of review. In this reply brief, Lambert shows that the question it presents is not only *appropriate for review of a summary judgment*, but also articulates an important federal question on the limits of the government's federal navigational servitude.

¹ Respondents are J. A. Jones Construction Company, and its six sureties, Aetna Casualty and Surety Company, The Travelers Indemnity Company, Standard Fire Insurance Company, Lumberman's Mutual Casualty Company, Employer's Reinsurance Corporation and North American Reinsurance Corporation, hereinafter collectively referred to as "Jones."

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ARGUMENT

Jones' opposition brief suggests that Lambert has smuggled before this Court a question which requires as a *predicate* review of the lower courts' findings with respect to Lambert's contractual right to mine sand from the disputed sandbar.² Jones' argument disregards the well established doctrine that this Court's power extends to address any matter fairly sub-

² See Respondents' Brief in Opposition, n. 1 at p. i, and n. 16 and accompanying text at p. 6.

sumed in the precise question presented for review. This Court's Rule 21.1(a) states in pertinent part:

" . . . The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition or fairly included therein will be considered by the Court."³

The Court has recently construed this Rule to mean that when resolution of a "question of law is a 'predicate to intelligent resolution' of the question on which [it] granted certiorari," it is fairly comprised within that question. *Vance v. Terrazas*, 444 U.S. 252, 258-259, n. 5, 100 S. Ct. 540, 544, n. 5, 62 L. Ed. 2d 461 (1980) reh. den.; *Cuyler v. Sullivan*, 446 U.S. 335, 342-343, n. 6, 100 S. Ct. 1708, 1715, n. 6, 64 L. Ed. 2d 333 (1980); and Stern, R., Gressman, E. & Shapiro, S.M., *Supreme Court Practice*, §6.25, p. 361 (6th ed. 1985).

The Court has also held that questions not explicitly mentioned but essential to analysis of the decisions below or to correct disposition of the other issues have been treated as "subsidiary issues 'fairly comprised' by the question presented." *Procunier v. Navarette*, 434 U.S. 555, 559-560, n. 6, 98 S. Ct. 855, 858-859, n. 6, 55 L. Ed. 2d 24 (1978); *United States v. Mendenhall*, 446 U.S. 544, 551-552, n. 5, 100 S. Ct. 1870, 1875-1876, n. 5, 64 L. Ed. 2d 497 (1980) reh. den.; and Stern, Gressman & Shapiro, *supra*, at §6.25, p. 361.

Viewed in light of these sound precepts, Jones' contention that review of the question Lambert presents on the navigational servitude is inappropriate unless first predicated on review of the lower courts' interpretation of the Lambert-

³ U.S. Sup. Ct. Rule 21.1(a), 28 U.S.C.A.

Jones contract completely ignores the proper standard for reviewing summary judgments.

The District Court in this case considered cross motions by the parties for partial summary judgment, and the judgment⁴ of which Lambert here seeks review *granted* Jones' prayer for dismissal of Lambert's complaint. Accordingly *Lambert*, with respect to the judgment below, is the *non-moving* party.

It is well settled law that the reviewing court must regard the record on summary judgment in the light most favorable to the party opposing the motion. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L.Ed. 2d 458 (1962); and *Central Oil & Supply Corporation v. United States*, 557 F. 2d 511, 515 (5th Cir. 1977) reh. and reh. en banc den. On review of summary judgment, an appellate court is required to "determine whether the record as it stands reveals any disputed issue of material fact, *assume the resolution of any such issue in favor of the non-movant*, and determine whether the movant is then entitled to judgment as a matter of law" (emphasis added). *First Jersey National Bank v. Dome Petroleum Limited*, 723 F. 2d 335, 338 (3rd Cir. 1983) reh. and reh. en banc den. (1984).

Therefore, in reviewing the judgment appealed from, this Court must resolve in Lambert's favor the disputed fact question of whether the purchase order gives Lambert a contractual right to supply sand from the disputed bar, and then decide whether Jones is entitled *as a matter of law* to judgment of dismissal by reference to the federal navigational servitude. In the context of summary judgment review, and in accordance with this Court's Rule 21.1(a), *Lambert has pre-*

⁴ See Judgment entered April 3, 1986 at p. 19a, App., of Lambert's Petition.

sented no preliminary question not already subsumed in the precise question in its Petition.

Jones in fact *obfuscates* what clearly is an issue raised by the record on the parties' cross motions for summary judgment: whether Lambert has a contract right to dredge the disputed sand. Jones asserts that, "Nothing in the Lambert/Jones purchase order mentioned the disputed bar, nor conditioned Lambert's performance or price on Lambert's right to use the bar."⁵ This however ignores the purchase order's *incorporation* of "all applicable provisions" in the prime contract between Jones and the Corps of Engineers,⁶ including a provision in the specifications which clearly gave Lambert a contractual right to supply the disputed sand to the project.⁷

Jones also states that, "Lambert asserted its right to the sand based solely on its lease with [Louisiana Delta Plantation]."⁸ In fact, Lambert's letter to Jones, which Jones offers in support of this notion, does not even make mention of the Lambert-Delta lease, but rather plainly asserts the breach of a contract right:

"The purpose of this letter is to acknowledge receipt of your direction and your order [to stop removing sand]; to protest the issuance and delivery of the same and to place you on notice that your action in this regard constitutes a *breach of contract* for which Lambert Gravel Company, Inc. shall hold

⁵ Jones' Opposition Brief, at p. 2.

⁶ See p. 53a, App., of Lambert's Petition; Jones' Opposition Brief in fact *later* (at p. 4, n. 9) notes this very provision.

⁷ Paragraph 5.4 of Division 2, Section 2D ("BACKFILL AND EMBANKMENT") of the Specifications, as augmented by Amendment 0003; see citation and argument at pp. 15 *et seq.* in Lambert's Petition.

⁸ Opposition Brief, at p. 2, n. 5 and accompanying text.

you responsible for all costs, expenses and damages occasioned thereby" (emphasis added).⁹

The record clearly reflects a dispute between the parties as to whether the Lambert/Jones purchase order conferred on Lambert the contractual right to supply sand from the disputed sandbar.¹⁰

⁹ Jones' Opposition Brief, at App. p. B3.

¹⁰ Neither court below has recognized this dispute, which is both factual and material, and sufficient therefore to preclude summary judgment. The district court did not address the issue, and the Fifth Circuit determined that Lambert's rights arose only from its lease with Delta. See *Lambert Gravel Company, Inc. v. J. A. Jones Construction Company*, 835 F.2d 1105, 1111 (5th Cir. 1988), p. 37a, App., in Lambert's Petition; see also argument at nn. 11 and 19 and accompanying text in Lambert's Petition.

CONCLUSION

Resolving the contract question in favor of Lambert for purposes of reviewing the district court's dismissal of Lambert's complaint by summary judgment, the clear question which remains for review by this Court is whether *as a matter of law* the federal navigational servitude extends to abate the contract rights of a Miller Act claimant. For the reasons averred in its Petition, Lambert again strongly urges this Court to grant a writ of certiorari to determine whether such contract rights constitute a "riparian interest" subject to the servitude.

RESPECTFULLY SUBMITTED this 24th day of June, 1988.

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